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APPLICATION OF PAYMENTS.

No. 1.

THE term "payment" is applied to the discharge, in part or wholly, of a debt or obligation to pay money, existing between the debtor and his creditor. This may be created *in presenti* while the obligation to discharge it is suspended or postponed to a future period. While in this state of suspension no rights or remedies are given to either party. The doctrine of "application of payments," however, covers both these kinds of debts. It is more strictly applicable to cases where debts exist between the two which are entirely separate and distinct in their origin, nature, and character; where, for instance, one is evidenced by specialty, and another by simple contract; or where one is contingent, and another absolute; or where one is secured by a surety or a pledge of property, and the other rests alone upon the individual responsibility of the debtor. In these and other similar cases it becomes necessary to inquire, where a general payment is made, to what debt such payment shall be applied.

It may here be important first to ascertain the rights of the parties paying and receiving—what each may do without the consent of the other. The debtor may undoubtedly pay or discharge his whole debt after it becomes due, or realize the full effect of such payment by a tender; and the creditor may, on his part, refuse

to receive any part of it before it becomes due, or any part, less than the whole, at any time afterwards. The debt is an entirety, and can only legally be discharged at once and not by partial payments.

The doctrine of application, appropriation, or imputation of payments, as it has been variously termed, has been claimed as derived by the common from the civil law. This claim rests upon the assumption that the principles adopted and applied by each system of law are sufficiently identical to justify the presumption of such derivation. This constitutes our main subject of inquiry, and the conflict in the cases will be found to grow out of the difference in views which courts have been led to entertain in reference to this point. The position I assume is that this application is made upon the well settled principles of the common law, and that really nothing has been borrowed from the civil.

We are here first to consider the right of the debtor at the time he makes a payment. In all cases where the right to make it at all exists, the debtor has the undoubted right to apply it to whatever account he chooses, and if he in any way indicates to the creditor the application he makes, the latter, if he receives and retains it, is understood to assent to such application and is bound by it. In this the civil and common law both agree, but each system so holds upon its own principles, and neither is under any obligations to the other. The voluntary character of the payment necessarily confers upon the debtor the right of fixing the terms upon which he makes it, and the creditor, if he accept it at all, must accept it upon the terms thus affixed. Although the creditor expressly refuse to give his assent to the terms of payment, yet his acceptance is nevertheless an affirmance of such terms, as his act shall prevail as against any words he may utter to the contrary. If the debtor pay with one clearly expressed intent, and the creditor receive with another, effect will be given to the former. This doctrine has never been doubted since the reign of Elizabeth : *Anonymous*, Cro. Eliz. 68. Where the debtor sends the money to the creditor, and along with it the notice of the account upon which he pays it, and the creditor while he accepts it refuses and continues to refuse admitting the payment as on that account, is nevertheless held bound by the notice which accompanies the payment : *Reed v. Boardman*, 20 Pickering 441, 446. He may even direct the application to the principal of a debt in exclusion

of the interest, although the law would make an application first to the payment of the interest: *Pindall's Executrix v. Bank of Marietta*, 10 Leigh 481, 484. This right of the debtor grows out of the fact that the money paid is his own, and he can do with it as he pleases; and also from the consideration that if the rule were otherwise the law itself might assist in the prevention, on the part of the creditor, of the due performance of the obligation to which the debtor is subject.

This right of the debtor must be exercised by him at the time he makes the payment. This is necessary in order to give the creditor the right of refusing to receive it in case he should choose to do so. This, it will be seen, is imposing no hardship on the debtor, as it only applies to cases where he is seeking either to pay a debt not yet due, or to make a partial payment upon one that is due. His right is perfect to pay the whole of a debt past due without consulting the wishes of the creditor. Where such declaration is made by the debtor, and the creditor receives it without objection, it is regarded as evidence of the creditor's assent to the application thus declared. If he dissents and refuses to receive it, that ends the right of the debtor to make it, for it must be remembered in all these cases that the doctrine only applies where the debtor is allowed to do a thing against the strict right of the creditor, and some evidence should, therefore, be required of a waiver of his right on the part of the latter.

There are cases in which the facts and circumstances existing at the time are such as to proclaim the intention of the debtor in the application of his payment so strongly as to dispense with the necessity of his making any declaration on the subject. Such are those of one debt's being due and the other not; one debt's being denied by him and the other admitted, with a delivery of the sum due upon the latter; that the sum paid was exactly the amount due upon one of the debts, and not upon another, or that at the time the payment was made the evidence of one of the debts was given up, while that of the other was retained. Another instance is where one debt is due from the debtor absolutely as principal, while the other is contingent, being that of a surety. Where property is assigned, or a security, payable at a future day, is given by a debtor to his creditor, one debt at the time only existing between them, and before the proceeds of the one are realized, or the payment on the other falls due, another debt is incurred, the

application must be upon the first debt: *Donally v. Wilson*, 5 Leigh 329. Where money is derived from a particular fund, as the sale of goods mortgaged or pledged for a debt, the mortgage or pledge is equivalent to a declaration by the debtor, and the creditor is not at liberty to make any other application: *Hicks v. Bingham*, 11 Mass. 300. In all these cases, however, it must be understood that the parties by their agreement may make a different application, or if the debtor declare a different application at the time of payment and the creditor receive it without objection, it must prevail over any legal presumption to the contrary. When the debtor has once made the payment and declared the application of it, it becomes irrevocable, and he cannot afterwards change it without the creditor's assent. The money, once his, has become that of his creditor, and with the implied agreement that its application shall be upon a particular debt. Even if applied in this way upon an unlawful debt, of which the law would not permit a recovery, the debtor cannot, when sued upon a lawful debt, apply the payment to it: *Treadwell v. Moore*, 34 Maine 115.

Where a debtor owing two or more distinct debts on separate accounts, makes a general payment without any express or implied application to any one of the debts, the right to make such application then passes from the debtor to the creditor. Two questions of interest here arise:

1. The principles upon which the application shall be made.

2. The time within which the creditor shall make it. The common, and the civil law, which on this subject have thus far held principles in common, on the first of these questions part company and never after come together. It is this divergence and separateness of course pursued by these two systems of law that has led to the conflict in the cases upon this subject. This conflict, so far as the spirit of these two systems has entered into it, is irreconcilable, and hence one of the systems must prevail to the utter exclusion of the other. The doctrine of the civil law on this question is very clearly set forth by STORY, J., in *Gass v. Stinson*, 3 Sumner 98-110, viz. that "such application turns upon the intention of the debtor either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he has the right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of the payment without objection; presumed, when in the

absence of any special appropriation, it is most for his benefit to apply it to a particular debt." It will thus be perceived that by the civil law the intentions of the debtor, whether declared by him or not, are to be fully carried out, and although it may nominally lie with the creditor, upon the debtor's failure, to declare the application, yet in so doing he must consult the presumed wishes of the debtor, and make it accordingly. It is, upon this principle, of little consequence whether the debtor expressly declares it at the time of payment or not, since the only risk he can run upon neglecting it is the possibility that his real intentions may be misapprehended. Perhaps the value of this risk is not as great as may be to him the opportunity of changing his original intentions according as subsequently occurring circumstances may seem to require. The doctrine of the civil law, with the reasonings upon which it is based, will be found in an article "On the application of payments" in the *American Law Magazine*, vol. 1, p. 31. It is worthy of note that the writer of this article invokes the high authority of Chief Justice GIBSON, and claims that in *Harter v. Conrad*, 12 Serg. & Rawle 305, he establishes the doctrine that in the application of indefinite payments, the interest of the creditor will never be regarded so long as there can be discovered any known or presumed interest on the part of the debtor. But Chief Justice GIBSON subsequently in the case of *Logan v. Mason*, 6 Watts & Serg. 9, alludes to this article, repudiates the inferences there drawn in regard to himself, and says expressly that the provisions of the civil law that the creditor shall consult the debtor's interest in preference to his own, has not been adopted as a part of the common law. That if the right of the creditor to make application is to be controlled by the interest of the debtor it is no right at all ; it is then a duty and not a right.

The common law doctrine upon this question is that when the debtor having the right to make the application, fails at the time of payment to make it, and no special circumstances furnish an equivalent to his declaration, the right after that belongs to the creditor, who may make any application he pleases ; that the debtor by his omission has waived his right, has made default, and then the right of the other party in interest becomes complete. Neither common law nor equity recognises any trust on the part of the creditor, which it can lay hold of and compel him to exercise this right in subserviency to the interests of the debtor. He is then

free to protect his own interests. This application can be made by the creditor in various ways, such as by verbal declaration, by the terms of the receipt at the time given, by rendering an account in which the application is stated, by bringing a suit grounded on a specific appropriation, or by any other act manifesting an intent, or inducing a belief, that a particular application is made.

There are certain limitations to the exercise of this right by the creditor ; these are,

1. That the debtor has had an opportunity of himself making the application, but has neglected to do so ; *Waller v. Lacy*, 8 Dowl. P. C. 563.

2. The limitation may arise out of the relation in which he stands to third persons, or from agreements with them, either express or implied ; as if two debts be due to him, one in his own right and the other as trustee or agent for another, neither being secured. In such case equity will appropriate a general payment rateably to each, as it holds the trustee bound to take the same care of the interests of his *cestui que trust* as of his own.

3. Where the creditor has two accounts against the debtor, one an individual, and the other against him as executor ; he is compelled to apply the payment to the individual account, and not on that of the executor ; *Goddard v. Cox*, Strange 1194.

Subject to these limitations the creditor may apply on a debt which rests solely on the responsibility of the debtor in preference to another upon which there is a surety, as the latter is not considered as having any equity capable of controlling the application of a payment. He may apply on a debt by simple contract in preference to one by bond or covenant under seal, or one evidenced by judgment. Where there are several notes, and several bonds, due at successive times, he is not compellable to apply so as to satisfy them successively in the order of time, but may apply to all rateably, or to the latest. Even if one debt be barred by the Statute of Limitations, and the other is not, he may apply it on the one so barred, but it will not have the effect to revive the remedy as to any balance that may remain unpaid : *Mills v. Fowkes*, 5 Bingham's New Cases 455. If one debt be enforceable only in equity and the other exist at law, he may apply on the former : *Bosanquet v. Wray*, 6 Taunton 597, 607. If one be not enforceable by reason of an informality and yet be justly due ; or if it be not recoverable at law, by reason of a statutory pro-

hibition, he may, nevertheless make the application to such debt. Even if he makes the application to a debt made unlawful by usury, and then sues upon the lawful one, the law will not change the application: *Treadwell v. Moore*, 34 Maine 115. In *Heyward v. Lomax*, 1 Vern. 23, it was held that the creditor could not appropriate a general payment to the discharge of a debt not bearing interest in preference to one upon which interest was running, the reason assigned being that "it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on account for which no interest is payable." This case is relied upon as one upholding the principles of the civil law, but its accuracy has been much doubted, and its principle is overruled in *Manning v. Westerne*, 2 Vern. 606, and in *Chase v. Box*, Freeman 261.

The inquiry as to time of application by the creditor has given rise to some diversity of decision. The civil law requires it to be made immediately; although as it prescribes the principles upon which it will alone permit it to be made, viz., for the benefit of the debtor, it would not appear to be very material when it was made, or even whether it was made by him at all or not. The common law, it is conceded, makes no such requisition, but the question that arises is whether there is any limitation of time within which it must be done, and if so what that limitation is. There are some dicta requiring that the application should be made within *a reasonable time*: *Simson v. Ingham*, 2 Barn. & Cress. 65, 75; *Harter v. Conrad*, 12 Serg. & Rawle 301, 305; *Briggs v. Williams*, 2 Verm. 283, 286. There is also a dictum of STORY, J., in *United States v. Kirkpatrick*, 9 Wheat. 720, 737, that the application cannot be made by a creditor after a controversy has arisen. This has also been adopted in some other cases, as in 12 Verm. 246, 249; 31 Maine 501; 3 Sumner 38; and 10 Conn. 176, 184. If this means a controversy in regard to the application itself, arising after the creditor has announced it, and involves his right to change his ground after having once declared it, it is undoubtedly correct. But in no other sense. The principle as collected from the numerous cases that have occurred on this subject is now understood to be that the creditor's right of appropriation is indefinite, and may be exercised at any time. So held by Lord HARDWICKE in *Wilkinson v. Sterne*, 9 Modern 427. The conclusion arrived at by Sir WILLIAM GRANT

in *Clayton's Case*, 1 Merivale 606, from a consideration of all the cases, was that the creditor was authorized to make his election when he thought fit, and was not confined to making it at the period of payment. Since that case many have occurred in which this question has been presented, and with a tolerably uniform result. Thus in *Peters v. Anderson*, 5 Taunton 596, the creditor was held to have appropriated a general payment by the mode in which he framed his action. In *Bosanquet v. Wray*, 6 Taunton 597, the creditor was held entitled to make the application at the time of trial. In *Philpot v. Jones*, 2 Adolp. & Ellis 41, Lord DENMAN, C. J., said the creditor might elect at any time to appropriate; and TAUNTON, J., that he might make it at any time before the case came under the consideration of a jury. In *Mills v. Fowkes*, 5 Bing. N. C. 455, it was held that he might make the application at any time before action. In *Simson v. Ingham*, 2 Barn. & Cress. 65, the expressions were "at any time before the action commenced," and "that the creditor is not limited in point of time." The idea generally conveyed in these cases is that the application must really be made before action brought, but that it need not be declared or manifested till the controversy in court. The American cases, with one or two exceptions, are equally clear. In the case of *The Mayor, &c., of Alexandria v. Patten*, 4 Cranch 317, 321, the doctrine that the creditor must make his election immediately received a decided negative. In *Stanet v. Barber*, 20 Maine 457, 461, it was decided that an application manifested by bringing suit within three months was early enough. In *Heilbron v. Bissel*, 1 Bailey's Equity 430, the conclusions arrived at are—that the creditor's right of appropriation is indefinite, and that the application may be made by him at any time. In *Moss v. Adams*, 4 Iredell's Equity, 42, 51, RUFFIN, C. J., concludes, after a careful review of the cases, that the principle is settled both in England and in this country that the creditor, when the right of appropriation has devolved upon him, may make it at any time before suit brought. In *Larabee v. Lambert*, 32 Maine 98, the right was asserted and given at the trial. These cases would seem to settle the question as one of general jurisprudence, but in Pennsylvania, in *Logan v. Mason*, 6 Watts & Serg. 9, 14, the Chief Justice held that the application ought to be simultaneous with the reception, and should appear to be a part of the *res gestæ* of payment. In New York, in *Allen v. Culver*,

3 Denio 284, and in *Pattison v. Hull*, 9 Cow. 747, it was denied that the application must be made immediately, but held sufficient if made within any reasonable time. The same doctrine was held in *Beidenbecher v. Lowell*, 32 Barb. 9, but in *Marsh v. Oneida Central Bank*, 34 Barb. 298, it was held unnecessary to apply a deposit towards payment of a note immediately on its becoming due, and that the right was not waived by omission until after the recovery of judgment thereon.

Upon common law principles it may now, therefore, be regarded as well settled that the creditor, upon whom has devolved the right of making the application, may direct it even at the trial, although it must be considered as having taken place in law before suit brought. He need not declare or manifest his election until the trial. This doctrine must have the qualification that he has not committed himself by his mode of bringing suit or otherwise. He has a right to change his mind, in reference to the application, as often as he chooses, until he has fully indicated it to the debtor, and that when he has once done so, either by verbal declaration, or rendering an account, or bringing suit in any way which declares the application, or by conduct inducing a reliance on a particular appropriation, he cannot afterwards change it. It has then become irrevocable. There must also be the further qualification contained in the case of *Pattison v. Hull*, 9 Cowen 747, 764, that when it becomes proper for the creditor to declare his election he cannot refuse to do so, and that he will not be permitted, to the inconvenience or injury of others, to hold the application in reserve, in order to await the result of future occurrences. When a proper regard for the rights or convenience of others requires it, he must make the application. The consideration of the principles upon which the law itself makes the application, in default of its having been done either by the debtor or the creditor, must be deferred until the next number.

A. D.